# Moey Yoke Lai (as attorney for Boy Sai Noi @ Moey Swee Kim pursuant to power of attorney dated 21 February 2013) v Ivan Ho Tiong Yin & Ors (joint executors of the estate of Chew Pheng Chong, deceased)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCVC-415–03 OF 2016
YEOH WEE SIAM J
7 DECEMBER 2016

*Succession — Executors — Joint administration — Testator appointed five persons to be joint executors/trustees of her estate — Whether this breached s 4(1) of the Probate and Administration Act 1959 and s 39(1)(a) and (b) of the Trustee Act 1949 — Whether maximum number of executors/trustees permissible was four — Whether attorney of sole beneficiary of estate failed to show good reason why joint executors/trustees had to be removed — Whether executors/trustees carried out their duties bona fide in best interests of estate — Whether court could not appoint attorney of sole beneficiary as sole executor/trustee of deceased's estate nor order all assets of estate to be transferred to beneficiary absolutely as this contradicted clear intentions expressed by testator in her will*

The plaintiff was the niece and attorney (appointed under a registered power of attorney) of a 95 year old lady ('Mdm Boy'). The defendants were the joint executors/trustees of the estate of Mdm Boy's only child, Chew Pheng Chong ('the deceased'). In her will, the deceased expressly instructed the defendants to use the estate's funds to provide for the upkeep and maintenance of Mdm Boy during the latter's lifetime and, after Mdm Boy's death, to sell off the estate and divide the proceeds among certain institutions/charities. The deceased's will was drafted by the first defendant, a lawyer. The second and fourth defendants (whose respective husbands were the third and fifth defendants) were particularly close to the deceased during her lifetime. The deceased's estate owned the condominium in which Mdm Boy lived and it paid for all of Mdm Boy's living expenses such as the salaries of her maid and live-in companion, Mdm Boy's medical bills, medical aids and health supplements and it also gave Mdm Boy a monthly maintenance of RM5,000. Despite these, the plaintiff had asked the defendants to allocate more funds for additional health supplements and personal expenses for Mdm Boy and to raise the salaries of, and pay bonuses to, the maid and live-in companion. The defendants had questioned or turned down many of the plaintiff's claims. Growing increasingly dissatisfied with the defendants and alleging that they had breached their duties as executors, the plaintiff filed the instant originating

summons ('OS') in which she, inter alia, applied for the defendants: (a) to be removed as joint executors/trustees and she be substituted in their place as sole executor/trustee of the estate; (b) to be ordered to prepare and deliver to her an account of the administration of the estate; and (c) to transfer all the assets of the estate to Mdm Boy absolutely.

**Held**, removing the fifth defendant as executor/trustee of the deceased's estate and granting only the prayer in the OS that the defendants furnish the accounts of the administration of the deceased's estate to Mdm Boy through the plaintiff within 60 days:

(1) The deceased had appointed five executors and trustees over her estate. This contravened s 4(1) of the Probate and Administration Act 1959 and s 39(1)(a) and (b) of the Trustee Act 1949. Under the said Acts, only a maximum of four persons could jointly be granted probate of a will or trusteeship over the same trust property. The fifth defendant was removed as executor and trustee because the facts showed that the first four defendants were the main persons who administered the deceased's estate and that the fifth defendant did not play a prominent or active role in that regard (see paras 29–32).

(2) The plaintiff was not the right person to be appointed as sole executor and trustee of the deceased's estate in place of the defendants. The deceased in her lifetime did not deem it fit to appoint the plaintiff either as her sole executor and trustee or even as one of the five executors and trustees. The intention in the will was very clear. The deceased never intended the plaintiff to be given control over the administration of her estate. The court had to give due consideration to the deceased's clear wishes and intention in her will and would not overrule what she had decided. Furthermore, there would be no check and balance over the plaintiff if she was made the sole executor and trustee and it would be highly risky and prejudicial to the preservation of the trust property and trust fund and the due administration of the deceased's estate (see paras 66–69).

(3) Since the defendants had not shown the plaintiff the accounts of the estate for 5 1/2 years, it was just and proper that there be transparency and accountability by the defendants in regard to their administration of the estate. Mdm Boy was the sole beneficiary under the estate and the plaintiff, as her attorney, ought to be given the accounts applied for (see para 71).

(4) It was contrary to the terms of the deceased's will for the court to order the assets of the estate to be transferred to and given to Mdm Boy absolutely. The deceased intended to provide for Mdm Boy during the latter's lifetime and after Mdm Boy's death, she intended her residuary estate to be given to the two monasteries or some other charity. The will provided

that it was only upon receipt by the proper officer of the monastery or charity entitled to the benefit that the executors or trustees would be discharged (see para 73).

(5) The court found that the defendants, on the whole, had acted bona fide in the best interests of the estate of the deceased and for the welfare of Mdm Boy as its beneficiary. There was no good ground to remove the defendants as executors and trustees of the estate. The plaintiff had failed to prove 'sufficient cause' that the defendants, by their acts and omissions, had endangered the estate of the deceased or had been dishonest or that they lacked proper capacity or reasonable fidelity. The plaintiff, acting as Mdm Boy's attorney, had no right to control the way the defendants acted as the trustees of the estate. The substantial part of the plaintiff's complaints was due to her dissatisfaction when the defendants did not allow her claims. It was clear that the defendants, in disallowing such claims, had acted in accordance with cl 8 of the will (see paras 49, 62 & 66–65).

**[Bahasa Malaysia summary**

Plaintif adalah anak saudara lelaki dan wakil (dilantik di bawah surat kuasa wakil berdaftar) seorang wanita berumur 95 tahun ('Mdm Boy'). Defendan-defendan adalah wasi/pemegang amanah harta pusaka anak tunggal Mdm Boy, Chew Pheng Chong ('si mati'). Dalam wasiatnya, si mati dengan jelas mengarahkan defendan-defendan menggunakan dana harta pusaka untuk memperuntukkan bagi penjagaan dan nafkah Mdm Boy sepanjang hidupnya dan, selepas kematian Mdm Boy, untuk menjual harta pusaka dan membahagikan hasil kepada institusi/badan amal tertentu. Wasiat si mati telah dibuat oleh defendan pertama, seorang peguam. Defendan-defendan kedua dan keempat (masing-masing isteri kepada defendan-defendan ketiga dan kelima) agak rapat dengan si mati semasa hayatnya. Harta pusaka si mati memiliki kondominium di mana Mdm Boy tinggal dan ia telah membayar untuk semua perbelanjaan hidup Mdm Boy seperti gaji pembantu rumah dan teman serumah, bil-bil perubatan, bantuan perubatan dan ubat tambahan kesihatan Mdm Boy dan ia juga memberi nafkah bulanan RM5,000 kepada Mdm Boy. Walau pun begitu, plaintif telah meminta defendan-defendan mengagihkan wang yang lebih untuk ubat tambahan kesihatan dan perbelanjaan peribadi Mdm Boy dan untuk menaikkan gaji untuk, dan membayar bonus kepada, pembantu rumah dan teman serumah. Defendan-defendan telah mempersoalkan atau menolak kebanyakan daripada tuntutan plaintif. Berasa semakin tidak puas hati dengan defendan-defendan dan mendakwa bahawa mereka telah melanggar kewajipan mereka sebagai wasi, plaintif telah memfailkan saman pemula ini ('SP') di mana dia antara lain, memohon agar defendan-defendan: (a) disingkir sebagai wasi/pemegang amanah bersama dan dia menggantikan tempat mereka sebagai wasi/pemegang amanah tunggal harta pusaka itu; (b) diperintahkan untuk

menyedia dan menyerahkan kepadanya penyata tentang pentadbiran harta pusaka itu; dan (c) untuk memindah semua aset-aset kepada Mdm Boy secara mutlak.

**Diputuskan**, menyingkir defendan kelima sebagai wasi/pemegang amanah harta pusaka si mati dan memberikan hanya permohonan dalam SP agar defendan-defendan mengemukakan penyata tentang pentadbiran harta pusaka si mati kepada Mdm Boy melalui plaintif dalam masa 60 hari:

(1) Si mati telah melantik lima wasi dan pemegang amanah untuk harta pusakanya. Ini bertentangan dengan s 4(1) Akta Probet dan Pentadbiran 1959 dan s 39(1)(a) dan (b) Akta Pemegang Amanah 1949. Di bawah Akta-Akta tersebut, hanya maksimum empat orang boleh secara bersesama diberikan probet untuk satu wasiat atau pemegangan amanah ke atas harta atas amanah yang sama. Defendan kelima telah disingkir sebagai wasi dan pemegang amanah kerana fakta menunjukkan bahawa empat defendan pertama adalah orang-orang utama yang mentadbir harta pusaka si mati dan bahawa defendan kelima tidak memainkan peranan penting atau aktif dalam keadaan tersebut (lihat perenggan 29–32).

(2) Plaintif bukan orang yang betul untuk dilantik sebagai wasi dan pemegang amanah tunggal harta pusaka si mati untuk menggantikan defendan-defendan. Si mati sepanjang hayatnya tidak memikirkan ia sesuai untuk melantik plaintif sama ada sebagai wasi dan pemegang amanah tunggal atau pun sebagai salah seorang daripada lima wasi dan pemegang amanah. Niat dalam wasiat itu adalah jelas. Si mati tidak pernah berniat untuk plaintif diberikan kawalan ke atas pentadbiran harta pusakanya. Mahkamah perlu memberikan pertimbangan sewajarnya untuk hasrat dan niat jelas si mati dalam wasiatnya dan tidak menolak apa yang telah diputuskan olehnya. Tambahan pula, tiada semak dan imbang ke atas plaintif jika dia dijadikan wasi dan pemegang amanah tunggal dan amat berisiko dan prejudis kepada pengekalan harta atas amanah dan dana amanah dan pentadbiran harta pusakan si mati (lihat perenggan 66–69).

(3) Oleh kerana defendan-defendan tidak menunjukkan plaintif penyata harta pusakan selama 5 1/2 tahun, ia adalah adil dan wajar bahawa terdapat ketelusan dan kebertanggungjawaban oleh defendan-defendan berhubung pentadbiran mereka ke atas harta pusakan itu. Mdm Boy adalah benefisiari tunggal di bawah harta pusakan itu dan plaintif, sebagai wakilnya, patut diberikan penyata yang dipohon itu (lihat perenggan 71).

(4) Ia adalah bertentangan dengan terma wasiat si mati untuk mahkamah memerintakan aset-aset harta pusaka itu dipindahkan kepada dan diberikan kepada Mdm Boy secara mutlak. Si mati berniat untuk

memberikan Mdm Boy sepanjang hayatnya dan selepas kematian Mdm Boy, dia berniat harta pusakanya yang tinggal diberikan kepada dua badan agama atau badan amal yang lain. Wasiat itu memperuntukkan bahawa ia adalah hanya setelah penerimaan oleh pegawai yang sewajarnya untuk badan agama atau badan amal yang berhak mendapat manfaat itu maka wasi atau pemegang amanah itu boleh dilepaskan (lihat perenggan 73).

(5) Mahkamah mendapati bahawa defendan-defendan, secara keseluruhan, telah bertindak dengan niat baik demi kepentingan harta pusaka si mati dan untuk kebajikan Mdm Boy sebagai benefisiarinya. Tiada alasan kukuh untuk menyingkir defendan-defendan sebagai wasi dan pemegang amanah harta pusakan itu. Plaintif telah gagal untuk membuktikan 'sufficient cause' bahawa defendan-defendan, melalui perbuatan dan peninggalan mereka, telah membahayakan harta pusakan si mati atau telah tidak jujur atau bahawa mereka tiada kapasiti sewajarnya atau kesetiaan munasabah. Plaintif, bertindak sebagai wakil Mdm Boy, tiada hak untuk mengawal cara defendan-defendan bertindak sebagai pemegang amanah harta pusaka itu. Sebahagian besar aduan plaintif adalah akibat rasa tidak puas hatinya apabila defendan-defendan tidak membenarkan tuntutannya. Ia adalah jelas bahawa defendan-defendan, dalam tidak membenarkan tuntutan tersebut, telah bertindak menurut fasal 8 kepada wasiat itu (lihat perenggan 49, 62 & 65–66).]

**Notes**

For a case on joint administration, see 11(2) *Mallal's Digest* (5th Ed, 2015) para 2614.

**Cases referred to**

*Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457, HC (refd)

*Khoo Boo Gong, Decd Khoo Teng Seong v Teoh Chooi Ghim & Ors, Re* [1981] 2 MLJ 68, FC (refd)

*Letterstedt v Broers & Anor* [1881-85] All ER Rep 882; (1884) 9 App Cas 371, PC (refd)

*Miller v Cameron* (1936) 54 CLR 572, HC (refd)

*Panchanath a/l Ratnavale (suing as the beneficiary to the estate of Ratnavale s/o Mahalingam @ Mahalingam Ratnavale deceased under will dated 10 February 1971) v Sandra Segara Mahalingam (sued as the executor and trustee of the last will of Ratnavale s/o Mahalingam @ Mahalingam Ratnavale deceased dated 10 February 1971) & Ors* [2012] 5 MLJ 109, HC (refd)

*Yusof bin Ahmad & Ors v Hongkong Bank (Singapore) Ltd & Ors* [1990] 2 MLJ 326, HC (refd)

**Legislation referred to**

Probate and Administration Act 1959 ss 2 4(1), 34
Trustee Act 1949 ss 39(1)(a), (1)(b), 40, 60

*Aimee Liew (Au Yong Wai Nyan with him) (YH Teh & Quek) for the plaintiff.*
*Kan Weng Hin (Lim Shu Teng and Jillian Yuen with him) (WH Kan) for the defendants.*

**Yeoh Wee Siam J:**

ENCLOSURE 1

**[1]** Enclosure 1 is the originating summons ('OS') filed by the plaintiff, in her capacity as the attorney of Madam Boy Sai Noi @ Moey Swee Kim ('Mdm Boy'), against the five defendants in their capacity as joint executors of the estate of the deceased, Chew Pheng Chong ('estate') ('the deceased').

**[2]** In this OS, the plaintiff applied for the following reliefs:

(a) that the defendants be removed as joint executors of the estate of the deceased, and be replaced with the plaintiff;

(b) a declaration that all distribution, benefit and gifts from the estate of the deceased for the benefit of Mdm Boy as beneficiary of the estate of the deceased are valid;

(c) the defendants be ordered to prepare and deliver to the plaintiff an account of the administration of the estate of the deceased;

(d) that the estate of the deceased be ordered to pay to the plaintiff or Mdm Boy:

(i) the amount of RM133,387.45 which is the outstanding sum due from the estate of the deceased for the care and maintenance of Mdm Boy as at 31 July 2015 including interest;

(ii) an amount of RM5,000 per month, where the payment for each month is to be paid on the first day of each month respectively; and

(iii) all the claims by the plaintiff and/or Mdm Boy on her own for the care and maintenance of Mdm Boy;

(e) and/or that all the assets of the estate of the deceased be transferred and/or given to Mdm Boy absolutely;

(f) costs; and

(g) any other reliefs deemed just and appropriate by this honourable court.

SALIENT FACTS

**[3]** The deceased passed away on 8 September 2010. Prior to her demise, the deceased had executed a will dated 30 April 2010.

**[4]** The deceased had no siblings and was the only child and daughter of Mdm Boy. The deceased was a religious person who practised Tibetan Buddhism. She was unmarried and had lived with her mother, Mdm Boy until the time of her demise. According to the defendants, the deceased was by nature a cautious person who had a small circle of persons whom she trusted. Her careful nature can be seen from the fact that she had three safes in her house, and the location and password for the third safe was a secret that she shared only with the second defendant.

**[5]** Madam Boy is currently 95 years old. She is now living in the condominium ('condo') which belongs to the estate of the deceased. All the utilities and the maintenance of the condo are paid for by the estate. Mdm Boy is accompanied by a live-in companion and a maid. The salary for both these persons are paid for by the estate of the deceased.

**[6]** The defendants, who are the executors and trustees of the estate of the deceased, were appointed pursuant to the grant of probate dated 23 November 2010 issued by the Kuala Lumpur High Court giving effect to the will of the deceased. The deceased had appointed the defendants, inter alia, to administer her estate with specific provision for the upkeep and maintenance of Mdm Boy during her lifetime, and subsequently, her estate was to be sold off and the proceeds divided among three named monasteries (the plaintiff's affidavit in support ('AIS'), exh 1).

**[7]** The plaintiff is the niece of Mdm Boy. She has been appointed as the attorney of Mdm Boy by way of a power of attorney dated 21 February 2013 that was registered with the Kuala Lumpur High Court on 26 February 2013 (exh 1 of the plaintiff's AIS).

**[8]** The first defendant ('Ivan') is a lawyer who practises under the name and style of Messrs Ivan Ho & Assoc at Kajang, Selangor. Sometime in April 2010, Ivan met the deceased through the second defendant who had asked Ivan to give legal advice to the deceased regarding the drafting of her will. Ivan drafted the will which was duly executed by the deceased on 30 April 2010.

**[9]** The second defendant ('Lulu') is the paternal cousin of the deceased. She is married to the third defendant ie Lee Tiong Guan. Besides growing up together, Lulu and the deceased also shared an interest in Tibetan Buddhism. They, together with Mdm Boy, frequently attended activities at the Tibetan

Religious Association. Lulu and her husband had followed the deceased on spiritual retreat to India to meet religious leaders including the Dalai Lama. Lulu introduced Ivan to the deceased because Ivan himself practises Tibetan Buddhism. The closeness of the relationship between the deceased and Lulu can be seen from the personal and private details which the deceased shared with Lulu regarding the existence and the password for the deceased's third safe. The deceased valued Lulu's opinion. When the deceased was diagnosed with cancer, she originally sought traditional and alternative treatment. However, subsequently, as a result of Lulu's advice, the deceased changed her mind and began chemotherapy in 2009 (the second defendant's affidavit in reply ('AIR'), paras 7, 10 and 17).

**[10]** The fourth defendant ('Susan') is a close friend of the deceased. She is married to the fifth defendant ie Leow Wei Kheong. Susan and the deceased have known each other since the 1980s through their shared common interest in their love for dogs. They first met when participating in dog shows and training activities held by the Malaysian Kennel Association. Susan also frequently spent time with Mdm Boy, when Mdm Boy joined the deceased and Susan for lunches, or for dog training related activities. Subsequently, when the deceased was diagnosed with cancer, Susan often accompanied the deceased for treatment at the Damansara Specialist Hospital.

**[11]** The deceased passed away sometime on the morning of 8 September 2010. In order to obtain the relevant burial permit, Ivan and Lulu had to remove from the deceased's safe the deceased's wallet which contained the identity card ('IC') of the deceased. Mdm Boy's IC was also in the wallet. The plaintiff was present at the deceased's home then, but she did not take the initiative to obtain the burial permit (the first defendant's AIR(1), exh 3).

**[12]** Subsequently, Lulu had kept Mdm Boy's IC. She had the previous instructions of the deceased to do so since the deceased was afraid that third parties would misuse Mdm Boy's IC. Lulu had made a police report on this. Mdm Boy's IC was subsequently returned to her upon the request of her solicitors (the second defendant's AIR(1), para 34, exh 2, and para 14 of first defendant's AIR(1), exh 4).

**[13]** Ivan and Lulu had organised and paid for the funeral of the deceased, using the donations collected from the friends and relatives of the deceased that attended her wake.

**[14]** Subsequently, the defendants had to give a sum of money equivalent to the donations to the plaintiff because the plaintiff claimed that the donations were supposed to be given to Mdm Boy and were not to be used to pay off the funeral expenses. According to the defendants, the deceased had made

provision in her will that the funeral expenses were supposed to be paid out from the estate of the deceased (the first defendant's AIR(2), para 11).

**[15]** The defendants contend that during the wake and burial of the deceased, Lulu and her husband (the third defendant) were the only ones who participated and carried out the Chinese funeral rites, including praying, kneeling and burning of incense sticks. There was no participation from the other relatives of the deceased, including the plaintiff.

**[16]** On the third day after the burial of the deceased, after Ivan had read the will of the deceased in the presence of the plaintiff, Mdm Boy, family members of the deceased and the defendants, the jewellery of the deceased was removed from the safe for an inventory to be made, pending the grant of probate. Once an inventory list was made, the list and the jewellery were placed back in the safe, in the presence of the parties concerned.

**[17]** On 21 September 2010, Ivan informed the plaintiff that Messrs SC Lim & Partners had been appointed as solicitors to handle the probate application. On 19 March 2011, the plaintiff and the defendants, in the presence of the lawyers for both sides, namely Ms Aimee Liew and Mr Au Yong Wai Nyan (who represented the plaintiff) and Ms Eunice Choo (who represented the defendants), upon confirming the inventory in the safe, handed the jewellery to Mdm Boy in accordance with the wishes of the deceased, as stated in her will (the first defendant's AIR (1), para 22, exh 8).

**[18]** The defendants contend that upon their appointment as executors and trustees, according to the will of the deceased, the defendants took steps to perform their duties which, inter alia, include the following:

(a) to investigate and make an inventory of the estate of the deceased;

(b) they liaised with the relevant authorities such as Bursa Malaysia, KWSP and also banks in and outside of the country, and such other related financial institutions as are necessary to call in the estate of the deceased;

(c) they took over and managed the funds and accounts of the deceased;

(d) they appointed accountants and solicitors to help manage the trust;

(e) they examined claims and made payments in accordance with the terms of will to the beneficiary namely, Mdm Boy, through the plaintiff as her attorney; and

(f) they made payments for the utilities and upkeep of the trust property ie the condo where Mdm Boy is currently residing.

**[19]** The defendants further contend that at all material times, they strived to perform their duties diligently, but they could not always meet the demands of the plaintiff especially when the demands were not in accordance with the terms of the will. For example, the plaintiff would constantly request for an increase in pay or for bonuses for the maid and companion of Mdm Boy. Despite this, the defendants tried their best to fulfil the plaintiff's requests provided that such requests were reasonable and in accordance with the terms of the will of the deceased (the second defendant's AIR(1), para 42).

**[20]** The defendants allege that despite the defendants' attempts to accommodate the plaintiff's requests, the plaintiff and the defendants could not get along. This can be seen in an incident at Standard Chartered Bank ('SCB') on 10 May 2011 whereby the plaintiff and her lawyers, Ms Aimee Liew and Mr Au Yong, opened the safe belonging to the deceased and Mdm Boy in the absence of the defendants. However, the defendants allowed the plaintiff alone to enter the safe room to witness the opening of the safe deposit box owned by the deceased (the first defendant's AIR(1), paras 24–25, exh 9).

**[21]** The defendants contend that through no fault of theirs, a SCB account jointly owned by the deceased and Mdm Boy was closed by the bank on their own initiative. The plaintiff had alleged that the defendants had deliberately closed the account. Such a claim was eventually proven to be erroneous and unfounded as SCB subsequently returned the money in the joint account which is still in existence till today (the first defendant's AIR(1), para 27, exh 11).

**[22]** The defendants aver that in accordance with the will of the deceased, they gave a sum of RM100,000 to Mdm Boy via a cheque dated 30 May 2011. This was done by gathering the money from different bank accounts. The exercise took some time as the defendants could only do so by attending the bank together since the bank required the signatures of all five executors before allowing the defendants to take over the funds belonging to the deceased (the first defendant's AIR(1), para 28, exh 12).

**[23]** The defendants further aver that in performing their duties, they had to sell shares in Bursa Malaysia registered under the name of the deceased. However, before the sale could be carried out, the shares had to be transferred and registered under the name of Ivan in accordance with the Bursa rules which prohibited an account to be opened under, or in the names of the five defendants, or in the name of the estate of the deceased. Subsequently, the shares were sold on 7 March 2012 and 8 March 2012 respectively, and the proceeds of the sale amounting to RM2,092,666.30 were banked into the Public Bank Bhd fixed savings account for the deceased on 13 March 2012.

This account has been managed and continues to be managed by the defendants (the first defendant's AIR(1), para 29, exh 13).

**[24]** The defendants allege that when they visited Mdm Boy during Chinese New Year 2016, they realised that she was senile and was not responsive to any of their queries. During this visit, the defendants also realised that Mdm Boy had scratches on her forehead. The plaintiff explained that Mdm Boy had fallen when she rushed to the bathroom at night. The defendants find that such an explanation by the plaintiff does not seem plausible because Mdm Boy was supposed to be assisted by a maid and a live-in companion at all times. In fact, Mdm Boy had to use a wheelchair to move around (the first defendant's AIR(1), para 32).

**[25]** On 16 March 2016, the plaintiff instituted this OS to remove all the five defendants as executors of the will of the deceased, and for the plaintiff to be appointed by the court as the sole executor instead.

THE COURT'S DECISION REGARDING ENCL 1

**[26]** On 28 May 2016, after hearing both parties on the OS, I gave the following decision:

| | | |
|---|---|---|
| Prayer (a) | : | Not allowed. However, in compliance with the provisions of the Probate and Administration Act 1959, and the Trustee Act 1949, the court now reduces the number of executors and trustees of the estate of the deceased from five to four. Accordingly, the fifth defendant is removed as executor and trustee of the estate of the deceased. |
| Prayer (b) | : | No order. |
| Prayer (c) | : | Allowed. The defendants are required to furnish the accounts to Mdm Boy through the plaintiff, within 60 days from the date of service of this order. |
| Prayer (d) | : | Dismissed. |
| Prayer (e) | : | Dismissed. |
| Prayer (f) | : | Costs of RM2,500 are to be paid by the defendants jointly to the plaintiff as the attorney and representative of Mdm Boy. |

APPEAL BY THE PLAINTIFF

**[27]** On 25 November 2016, the plaintiff filed her appeal against the whole of my decision, namely on prayers (a), (b), (d), (e) and (f), except prayer (c).

APPEAL BY THE DEFENDANTS

**[28]** On the same day, 25 November 2016, the five defendants filed their appeal against part of my decision, namely on prayers (c) and (f).

GROUNDS FOR DECISION

*Prayers (a) and (d)*

Having five executors and trustees is in breach of the law

**[29]** Section 4(1) of the Probate and Administration Act 1959 ('Act 97') is clear in mandating that the number of 'representation' for the probate of a will is limited to a maximum of four persons, and not more. It provides as follows:

> 4 Restrictions on grant.
>
> (1) Representation shall not be granted to more than four persons in regard to the same property.

'representation' has been defined in s 2 of Act 97 to mean, inter alia, 'the probate of a will and administration ...'.

**[30]** It is observed that similarly, in s 39(1)(a) and (b) of the Trustee Act 1949, the number of trustees is limited to four persons:

> 39 Limitation of the number of trustees.
>
> (1) In the case of settlements and dispositions on trust of property, whether movable or immovable, made or coming into operation on or after the material date —
>
> (a) the number of trustees thereof shall not in any case exceed four, and where more than four persons are named as such trustees, the four first named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy; and
>
> (b) the number of the trustees shall not be increased beyond four.

**[31]** In the present case, the deceased had appointed five executors and trustees. This is clearly in contravention of s 4(1) of Act 97 and s 39(1)(a) and (b) of the Trustee Act 1949. Relying on this ground, the plaintiff applies to remove all the five defendants as executors and trustees of the estate of the deceased, and to get herself substituted and appointed as the sole executor and trustee instead.

The court's supervisory powers on trustees

**[32]** To my mind, it requires a sensible and straightforward solution to the issue posed by the excessive number of executors and trustees. I decided to reduce the number of executors and trustees here from five to four. The fifth defendant was removed because, from the facts of the case, it appears to me that out of the five defendants, the fifth defendant did not play a prominent or active role as an executor and trustee. The first four defendants appear to be the main persons administering the estate of the deceased. Therefore, in my opinion, the fifth defendant can be dispensed with, leaving the first four defendants to be the remaining executors and trustees. This is in accordance with s 39(1)(a) Trustee Act 1949 where it expressly states that where the number of trustees exceed four, the first four named trustees shall alone be the trustees. My decision is also made pursuant to prayer (g) of the OS where the court may grant any other relief as it deems just and appropriate.

**[33]** In fact, s 60 of the Trustee Act 1949 provides for the inherent powers of the court to appoint a new trustee upon an application made by any persons beneficially interested or entitled to the land etc:

> 60 Persons entitled to apply for orders.
>
> (1) An order under this Act for the appointment of a new trustee or concerning any interest in land, stock, or thing in action subject to a trust may be made on the application of any person beneficially interested in the land, stock, or thing in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.
>
> (2) An order under this Act concerning any interest in land, stock, or thing in action subject to a charge may be made on the application of any person beneficially interested in the property charged, whether under disability or not, or of any person interested in the money secured by the charge.

**[34]** However, the court did not deem it fit to grant the plaintiff's prayer to remove all the five defendants as executors and trustees, and to appoint the plaintiff instead.

**[35]** The plaintiff cites s 40 of the Trustee Act 1949 as one of the basis for the court to remove the five defendants as executors and trustees:

> 40 Power of appointing new or additional trustees.
>
> (1) *Where a trustee*, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of Malaysia for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, *or refuses or is unfit to act* therein, *or is incapable of acting* therein, or is a minor then, subject to the restrictions imposed by this Act on the number of trustees —

A

(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

(b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee,

B

may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased, remaining out of Malaysia, desiring to be discharged, refusing, or being unfit or being incapable, or being a minor, as aforesaid.

C

(2) Where a trustee has been removed under a power contained in the instrument creating the trust, a new trustee or new trustees may be appointed in the place of the trustee who is removed as if he were dead, or, in the case of a corporation, as if the corporation desired to be discharged from the trust, and this section shall apply accordingly, but subject to the restrictions imposed by this Act on the number of trustees. (Emphasis added.)

D

**[36]** With respect, I did not think that s 40 of the Trustee Act 1949 can empower the court to appoint a new trustee. In my opinion, the same s 40 only empowers the person nominated for the purpose of appointing trustees by the instrument creating the trust, or the surviving or continuing trustees or their personal representative, to appoint other persons to be the new trustees.

E

**[37]** Notwithstanding that, from a reading of s 40 of the Trustee Act 1949, the principle that can be gleaned is that if a trustee refuses or is unfit to act, or is incapable of acting, then a new trustee or additional trustees may be appointed.

F

**[38]** In *Yusof bin Ahmad & Ors v Hongkong Bank (Singapore) Ltd & Ors* [1990] 2 MLJ 326, trustees may be removed on the following grounds:

G

The acts or omissions which are sufficient for the removal of trustees must be such as to endanger the trust property, to show want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

H

**[39]** In fact, over a century ago, similarly in *Letterstedt v Broers & Anor* [1881-85] All ER Rep 882; (1884) 9 App Cas 371, it was stated that 'an executor has an obligation to preserve the trust fund and to safeguard the interest of the beneficiaries'. In *Miller v Cameron* (1936) 54 CLR 572, an Australian case, Dixon J restated as follows:

I

The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the court forms a judgment based upon considerations, possibly large in number and varied in character, which

combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary.

The plaintiff's grounds for the OS

**[40]** The plaintiff submitted the following grounds for removal of the five defendants as executors of the estate, namely for breach of duty as executors:

(a) refusal to pay for the funeral expenses, totaling RM12,073;

(b) depriving Mdm Boy of her IC;

(c) not furnishing a copy of the deceased's will despite the plaintiff's oral and written requests;

(d) not providing the list of inventory in the safe and not listing them in the grant of probate;

(e) the plaintiff was never informed of when the grant of probate was applied for and granted despite Mdm Boy being the sole beneficiary;

(f) negligence and breach of duty as executors by listing in the bank account where monies do not belong to the estate;

(g) negligence and breach of duty as executors by transferring monies from the bank account where monies do not belong to the estate;

(h) failure to administer the estate expeditiously. The sum of RM100,000 was only paid on 30 May 2011 ie six months after the grant of probate was obtained on 23 November 2010;

(i) shares transferred from the deceased's estate to the first defendant;

(j) estate's shares sold, but monies not given to the plaintiff;

(k) medical expenses of the deceased and plaintiff totaling RM6,809.10 were not paid;

(l) delay in monthly payments to the plaintiff;

(m) failure to make payment of 'other personal expenses' of the plaintiff;

(n) failure to make payment for plaintiff's companion and maid, and nutritional supplements;

(o) the defendant's cheque dated 25 September 2015 was dishonoured;

(p) no accounts rendered for 5 1/2 years of executorship despite the plaintiff's many requests; and

(q) failure to distribute to the plaintiff absolutely the estate of the deceased.

Whether the defendants acted in the best interests of the estate

**[41]** The defendants submit that the defendants can only be removed as executors if they have failed to perform their duties under the will of the deceased. The defendants submit further that they have complied with the will by providing for Mdm Boy whilst she is alive.

**[42]** According to the defendants, the deceased had always made it known to the defendants that she wanted Mdm Boy to be taken care of for the rest of her lifetime. The deceased herself gave the plaintiff two cheques under her SCB account (cheques numbered 200890 and 200891) so that the plaintiff could use the money for the funeral expenses and for the daily expenses of Mdm Boy while waiting for the grant of probate to be issued by the court. I therefore agree with the defendants' submissions that the plaintiff's claim of facing difficulties in providing for Mdm Boy is unsustainable and untrue because between the time of the deceased's demise and the grant of probate, the plaintiff had approximately RM230,000 at hand to provide for Mdm Boy (the first defendant's AIR(1), para 12 and exh 1, and the first defendant's AIR(2), para 9).

**[43]** According to the defendants' explanation, once the probate was issued, the defendants began to carry out their duties as executors and trustees. At all times, the defendants had approved all the claims brought by the plaintiff if such claims were reasonable to ensure that the welfare of Mdm Boy would be well taken care of. As provided for under the will of the deceased, the defendants had made and continue to make payments for Mdm Boy, inter alia, for:

(a) maid;

(b) companion;

(c) monthly maintenance of RM5,000;

(d) health supplement expenses;

(e) personal expenses;

(f) medical bills and medical aids; and

(g) maintenance costs for Mdm Boy's Surian Condo eg the water bill, electricity bill, quit rent and assessment, and maintenance fees (the second and third defendants' AIR(2), para 14).

**[44]** In addition to the above payments, the defendants had to deal with four types of claims from the plaintiff, allegedly on Mdm Boy's behalf:

(a) for health supplements bought from Extra Excel (Malaysia) Sdn Bhd;

(b) for bonuses for the maid and companion of Mdm Boy;

(c) for pay raises for the maid and companion of Mdm Boy; and

(d) for personal expenses.

Compliance with cl 8 of the will

**[45]** It is noted that the defendants, in entertaining these four types of claims above, have full discretion under cl 8 of the will of the deceased.

**[46]** Clause 8 of the will states as follows:

> 8. I direct my Trustee to hold on trust the moneys standing to my credit in all my bank accounts and all my unit trusts/mutual fund investment (hereinafter known as the 'Trust Fund') for the purpose of the maintenance and medical expenses of my mother MOEY SWEE KIM NRIC No 210726-10-5086 together with my property known as C-03–08, Block C, Surian Condominiums, Jalan PJU 7/12B, Mutiara Damansara, 47810 Petaling Jaya, Selangor (hereinafter known as the 'Trust Property') until the demise of my mother MOEY SWEE KIM NRIC No 210726-10-5086).
>
> During the trust period my Trustee shall pay RM10,000.00 every month to my mother MOEY SWEE KIM NRIC No 210726-10-5086. My trustee shall have the full discretion as to how much to advance from the 'Trust Fund' to my mother in order to fulfill the objective of the trust.
>
> My Trustee shall also allow my mother to reside in the Trust Property rent free and my Trustee shall have no power to sell the Trust Property.
>
> During the trust period if the Trust Property is not resided by my mother, my Trustee shall have the power to lease the Trust Property at the prevailing market rate to interested parties and the income generated after payment for the maintenance, upkeep of the Trust Property, its quit rent and assessment shall form part of the Trust Fund.
>
> If my mother resides in the Trust Property, my Trustee shall pay for the maintenance, upkeep of the Trust Property, its quit rent and assessment from the Trust Fund.
>
> At the end of the trust period, I direct my Trustee to sell the Trust Property at the prevailing market rate and the net proceeds of the sale together with any remaining balance from the Trust Fund shall be given to the monasteries named below in equal shares.
>
> (i) WOGMIN THUPTEN SHEDRUP LING DRIKUNG KAGYU MONASTERY located at P.O. Rewalsar 175023, District of Mandi, Himachel Pradesh, India;
>
> (ii) JANGCHUB LING DRIKUNG KAGYU MONASTERY located at P.O. Kulhan, Post Box No. 48, Sahastradhara Road, Dehra-Dun 248001 UP (Uttar Pradesh), India.

> If at my death any of the monasteries named herein above has ceased to exist or has amalgamated with another monastery or has changed its name the gift to the monastry shall not fail but my Trustee(s) or Executor(s) is shall pay it to the monastry which they consider nearly fulfill the objects that I intended to benefit.
>
> The receipt of a person who appears to be a proper officer of a monastry entitled to benefit under this clause shall be a discharge to my trustee(s) or Executor(s).

**[47]** In *Panchanath a/l Ratnavale (suing as the beneficiary to the estate of Ratnavale s/o Mahalingam @ Mahalingam Ratnavale deceased under will dated 10 February 1971) v Sandra Segara Mahalingam (sued as the executor and trustee of the last will of Ratnavale s/o Mahalingam @ Mahalingam Ratnavale deceased dated 10 February 1971) & Ors* [2012] 5 MLJ 109 Harmindar Singh JC (as he then was) at pp 124–125 cited *Todd & Wilsons Textbook on Trust* (8th Ed), as follows:

> [41] In *Todd & Wilson's Textbook on Trust* (8th Ed), the learned authors set out the general principles governing the duties of trustees towards beneficiaries as follows (at p 376):
>
> > Although the ultimate benefit under a trust goes to the beneficiaries the trustees are concerned not only with their wishes, but also with those expressed by the settlor in the creation of the trust. *There is therefore no general principle which permits the beneficiaries to control the way in which the trustees exercise their discretions*. Were it otherwise, the trustees would be hopelessly handicapped in fulfilling their overriding duty towards the thrust (sic) as a whole and *the court will never compel the trustees to act under orders from the beneficiaries where a power or discretion has been entrusted to the trustees alone*. This will hold as long as the trust continues, although if the beneficiaries collectively wish they can bring the trust to an end and resettle the property on any terms they wish, under the *Saunders v Vautier* doctrine (see further chapter 17).
> >
> > *Tempest v Lord Camoys* (1882) 21 Ch D 571 shows the position while the trust continues. The beneficiaries desired the trust to purchase an estate but one of the trustees objected. Jessel MR refused to interfere with that trustee's bona fide decision. *Strictly, the trustees are under no obligation even to consult with the beneficiaries as to how a power or discretion should be exercised, although of course they will often do so in practice*. (Emphasis added.)

**[48]** As submitted by the defendants, in *Parker and Mellows: The Modern Law of Trusts* (9th Ed) at p 192 it is stated:

> ... it is fundamental to the nature of a trust that a trustee, or for that matter anyone else who is exercising discretions and powers, should not be a puppet at the end of a string pulled by the settlor or by the beneficiaries; he must instead be a person who can and will exercise and independent judgment over a wide field ...

**[49]** Applying the above principles, it is clear that the plaintiff, acting as the attorney of Mdm Boy, has no right to control the way the defendants acted as trustees.

**[50]** The matter of funeral expenses is not an issue. Clause 9(a) of the will has provided, inter alia, for the trustees to pay the funeral expenses from the estate of the deceased. The plaintiff had insisted that all donations collected from friends and relations during the wake of the deceased be given to Mdm Boy. The defendants have duly complied with that though initially the first and second defendants had organised and paid for the funeral of the deceased using the donations collected.

**[51]** From the evidence adduced, it is clear that the defendants did not deprive Mdm Boy of her IC. The second defendant had previous instructions from the deceased to take care of Mdm Boy's IC lest it be misused by third parties. The second defendant had lodged a police report on the matter. Mdm Boy's IC has since been returned to her on the request of her solicitors. The matter is no longer an issue.

**[52]** It is the defendants' right and duty, being the executors and trustees of the estate of the deceased, to hold the will in order to carry it out. There is nothing wrong for the plaintiff to be given a copy of the will upon her request since she is Mdm Boy's attorney. However, it cannot be a ground for the removal of the defendants as executors and trustees merely for the reason that they did not furnish the plaintiff with a copy of the will.

**[53]** The defendants are also under no legal obligation to the plaintiff to inform her as to when they applied for and were granted the probate. Despite this, on 21 September 2010 the first defendant informed the plaintiff that Messrs SC Lim & Partners had been appointed as solicitors to apply for probate. Further, the defendants are not answerable to the plaintiff, and they do not have to inform the plaintiff of the list of the inventory from the safe, or get her approval in not listing them in the grant of probate. The court at the material time has granted the probate since the papers were in order, including the list of assets shown. The plaintiff did not institute any action to challenge that grant of probate. It is now too late in the day for the plaintiff to find fault with the defendants regarding this matter. It is also unreasonable for the plaintiff to raise the issue about not being given a list of the inventory from the safe when clearly the plaintiff was present when the safe was opened, and therefore she has full knowledge of the same.

**[54]** As for the shares, before the sale of such shares, in accordance with Bursa rules, the shares had to be transferred into a single name, and not five names. Thus, the shares were transferred into the name of only the first defendant, and

not all the five defendants. The shares have already been sold and the proceeds of the sale ie RM2,092,666.30 have been banked into the Public Bank fixed savings account of the deceased on 13 March 2012. The defendants are still managing the account. There is no good reason for the plaintiff to query the defendants on this.

**[55]** Regarding the plaintiff's claims for health supplements, I accepted the reasonable explanation afforded by the defendants, namely that they found duplicity in the claims because the same supplements purchased from Extra Excel were being purchased from different places ie hospitals, pharmacies as well as from GNC Live Well. When asked by the defendants to justify these purchases by way of a prescription from a doctor or the relevant experts, as Mdm Boy is already in her 90s, the plaintiff refused to do so. Till today, the plaintiff has not provided an explanation as to why Mdm Boy requires so many supplements. Therefore, it is clear that the repeated claims for these supplements by the plaintiff are unreasonable (the first defendant's AIR(1), paras 34(a), 35(v) and 35(vi), and the first defendant's AIR(2), para 27).

**[56]** As for the claim for bonuses for the maid and companion of Mdm Boy, it is observed that there are no terms in the will of the deceased which allow the defendants to pay any such bonuses (para 34(b) of the first defendant's AIR(1)).

**[57]** Similarly, there are also no terms in the will of the deceased that allow for any pay raises for the maid and companion of Mdm Boy. As submitted by the defendants, the plaintiff's claim for such raise was outside of the market price. Nevertheless, the defendants did raise the pay of the maid after taking into account the market price for the years 2014 and 2015. Instead of RM1,600 a month which the plaintiff had requested, the defendants had paid RM1,500 a month (the first defendant's AIR(2), para 29, exh 27), which the court thinks is a reasonable salary.

**[58]** The defendants could not allow the plaintiff's claims for personal expenses to provide Mdm Boy's meals and miscellaneous necessities amounting to RM2,000 a month because there are no terms in the will of the deceased which allow the defendants to increase the monthly maintenance from RM5,000 to RM7,000. In disallowing the claim, the defendants had taken into consideration the fact that Mdm Boy is already in her 90s (the first defendant's AIR(1), para 35(ii), exh 16). The court finds that the defendants had acted in accordance with the express terms of the will of the deceased.

**[59]** The plaintiff alleged that the defendants had provided Mdm Boy with insufficient funds, which is denied by the defendants. However, the court is informed by the defendants that to date the plaintiff has in her possession

money from the estate of the deceased amounting to RM1,407,499.20 to support and maintain Mdm Boy, who is 95 years old, the details of which are as follows:

(a) from the deceased on 1 September 2010 and 7 September 2010, before she passed away on 8 September 2010 (RM120,000);

(b) amounts withdrawn from the joint account wherein a portion was from the sale of the shares of Tanjong Public Ltd Co (RM105,920.79);

(c) balance amounts withdrawn from the Standard Chartered bank account (RM14,479.21);

(d) an amount of RM100,000 which was given by the defendants according to the terms of the will of the deceased;

(e) RM39,337.69 from the joint account of the deceased with Mdm Boy;

(f) trust units from Public Mutual Bhd (RM250,000);

(g) donations from relatives and friends (unknown amount, which the plaintiff did not give an account thereof);

(h) monthly maintenance amounting to RM5,000 a month from September 2010–March 2016, which to date amounts to RM335,000;

(i) other claims from the plaintiff that were paid by the defendants amounting to RM442,761.59; and

(j) jewellery.

(The first defendant's AIR(2) para 33.)

**[60]** I agree with the submissions of the defendants that the large sum of RM1,407,499.20 is more than adequate to support a 95 year old lady such as Mdm Boy, especially when all the household utilities and the maintenance fees of the trust property (ie Mdm Boy's home) are paid by the defendants in accordance with cl 8 of the will. Therefore, the maintenance amount of RM5,000 a month solely for the expenses of Mdm Boy is sufficient. According to the defendants, the deceased was aware of the needs and expenses of her mother who was 89 years old at the time when the deceased passed away. In fact, during her lifetime the deceased had told the second defendant that the amount of RM5,000 a month was more than enough to maintain the needs of Mdm Boy because the deceased and Mdm Boy did not live a luxurious lifestyle (the second and third defendants' AIR(2), para 17).

**[61]** It is true as submitted by the defendants, that the role of the defendants in so far as the performance of their duties as executors are concerned have all been performed. They have called in the assets from the various sources such as

A the selling of the shares, and bank accounts. In accordance with the will, they have given the sum of RM100,000 and the jewelleries to Mdm Boy. There were no claims from any creditors or other beneficiaries, if any, against the estate of the deceased. However, I am of the opinion that since the will has provided for the distribution of the residuary estate upon the demise of Mdm Boy, the role
B of the defendants as executors has not ended completely. Be that as it may, it is clear that the main role of the defendants now is in the capacity as trustees of the estate of the deceased.

C **[62]** From the evidence adduced, apart from the complaints of the plaintiff which i do not think are so serious as to necessitate the removal of the defendants as executors and trustees, the court finds that the defendants on the whole appear to have acted bona fide in the best interests of the estate of the deceased, and for the welfare of Mdm Boy as a beneficiary.

D

**[63]** In *Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457 Jeffrey Tan J (as he then was) referred to *Story's Equitable Jurisprudence*, s 1289 which has the following commentary which was cited with approval by the Privy Council in *Letterstedt v Broers & Anor* [1881-85] All ER Rep 882;
E (1884) 9 App Cas 371:

> ... it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

F

**[64]** Further to that, it is observed that s 34 of Act 97 provides that 'Any probate or letters of administration may be revoked or amended for any sufficient cause' (see also *Re Khoo Boo Gong, Decd Khoo Teng Seong v Teoh Chooi*
G *Ghim & Ors* [1981] 2 MLJ 68 where the Federal Court applied the strict objective test in the same s 34 of 'sufficient cause' in the due and proper administration of the estate and in the best interest of the beneficiaries).

**[65]** The plaintiff has failed to prove to this court 'sufficient cause' that the
H defendants, by their acts and omissions, have endangered the estate of the deceased, or have been dishonest, or lacking proper capacity or reasonable fidelity. It is noted that the substantial part of the plaintiff's complaints is due to the plaintiff's dissatisfaction when the defendants did not allow the plaintiff's claims. However, it is clear that the defendants, in disallowing such
I claims, had acted in accordance with cl 8 of the will.

Whether the plaintiff ought to be substituted as the sole executor and trustee of the estate of the deceased

**[66]** The court finds that there is no good ground to remove the defendants as executors and trustees of the estate of the deceased. Even if the court were to remove them (which the court would not do), I do not think that the plaintiff is the right person to be appointed as the sole executor and trustee of the estate in place of the defendants.

**[67]** This is in view of the fact that even though the plaintiff is the niece of the deceased's mother, Mdm Boy, the deceased in her lifetime did not deem it fit to appoint the plaintiff as the sole executor and trustee of the deceased's estate. The deceased appointed not one, but five executers and trustees to act jointly. The deceased did not even appoint the plaintiff as one of her five executors and trustees. Thus, the intention of the deceased in making her will is very clear. The deceased had never intended that the plaintiff be given control over the administration of her estate.

**[68]** The court, after giving due consideration to the deceased's clear wishes and intention as shown in her will, therefore deems it fit and proper that the plaintiff should not be appointed to replace the five defendants, thereby overruling what the settlor, ie the deceased, had decided.

**[69]** It is also obvious to the court that the plaintiff, for her own personal reasons or gain, is attempting to wrest total control of the estate as the attorney of Mdm Boy who is now 95 years old, in a wheelchair, and appears to be senile to the defendants since she is not responding to the defendants' queries. If the plaintiff is made the sole executor and trustee of the estate of the deceased, there will be no check and balance over her, as in the case of having the five defendants who have to act jointly. It would therefore be highly risky and prejudicial to the preservation of the trust property and trust fund, and due administration of the estate of the deceased, if the court were to allow prayer (a) of the OS.

*Prayer (b)*

**[70]** As submitted by the defendants, prayer (b) is not clear. It appears to me that the plaintiff seems to be seeking a declaration from this court to validate all distribution, benefit and gifts from the estate for the benefit of Mdm Boy as a beneficiary. With respect, the court finds that prayer (b) does not make sense. In my opinion, all distribution and payments made to Mdm Boy are in accordance with the will, and therefore valid. I see no reason why this court

should be 'used' to making such a peculiar declaration when it is trite that the terms of the will must be carried out at all times. Therefore, I made no order on prayer (b).

*Prayer (c)*

**[71]** Since the defendants have not shown the plaintiff the accounts of the estate of the deceased for 5 1/2 years, the court is of the opinion that it is only just and proper that there be transparency and accountability by the defendants in regard to their administration of the estate. At this point in time, Mdm Boy, who is still alive, is the sole beneficiary of the estate of the deceased. The plaintiff, being Mdm Boy's attorney, ought to be given the accounts applied for. I therefore allowed prayer (c), but gave the defendants sufficient time, ie 60 days from the date of service of the order, to furnish the plaintiff with the accounts. To my mind, the defendants, if they are carrying out their duties as executors and trustees of the estate properly and in accordance with the will, would have nothing to hide. Therefore, there should be no reluctance on their part to furnish such accounts as prayed by the plaintiff.

*Prayer (e)*

**[72]** The court cannot allow prayer (e) for the reason that, upon a careful perusal of the will, it is clear that the deceased had envisaged that after Mdm Boy passes on, there would be a residuary estate. In the fifth paragraph of cl 8 of the will, the deceased has stated that at the end of the trust period, she directs her trustee to sell the trust property and give the net proceeds of the sale, together with the trust fund, to the monasteries named therein. In addition, the deceased stated expressly in cl 9(b) of her will that her residuary estate would be divided equally and given to the two named monastries, and a third monastry, as follows:

> 9. My Trustee shall hold the rest of my estate on trust to retain or sell it and:
>
> (a) ...
>
> (b) To liquidate the residue ('my residuary estate') and the net proceeds of the sale shall be divided equally between WOGMIN THUPTEN SHEDRUP LING DRIKUNG KAGYU MONASTERY of P.O. Rewalsar 175023, District of Mandi, Himachel Pradesh, India and JANGCHUB LING KRIKUNG KAGYU MONASTERY of P.O. Kulhan, Post Box No 48, Sahastradhara Road, Dehra-Dun 248001 UP (Uttar Pradesh), India. If at my death any of the monastries named herein in this clause has ceased to exist or has amalgamated with another monastry or has changed its name the gift to that monastry shall not fail but my Trustee(s) or Executor(s) shall pay it to the monastry which they consider nearly fulfill the objects that I intended to benefit.
>
> The receipt of a person who appears to be a proper officer of a charity entitled to

benefit under this clause shall be a discharge to my Trustee(s) or Executors(s). A

**[73]** The terms of cll 8 and 9(b) of the will have to be complied with by the defendants, as the executors and trustees of the estate of the deceased. Thus, it would be contrary to the terms of the will if the court were to allow prayer (e) and order that all the assets of the estate of the deceased be transferred to and given to Mdm Boy absolutely. That is certainly not the intention of the settlor/deceased. The deceased's intention is to provide for her mother during Mdm Boy's lifetime. After Mdm Boy passes on, ie at the end of the trust period, the deceased intended that her residuary estate be given to the two monastries, or some other charity. It is only upon receipt by the proper officer of the monastery entitled to benefit under cl 8, or by the proper officer of a charity entitled to benefit under cl 9(b) of the will, as the case may be, that the executors or trustees be discharged. B C

*Prayer (f)* D

**[74]** I ordered the defendants jointly to pay costs of RM2,500 to the plaintiff. This is for the reason that the plaintiff had incurred costs in filing this OS in order to compel the defendants to prepare and deliver to the plaintiff an account of the estate of the deceased. Without a court order, for 5 1/2 years the defendants had refused to furnish the plaintiff with the accounts despite her repeated requests. The plaintiff, as the attorney of Mdm Boy, has a duty to protect the interests of Mdm Boy as the beneficiary of the estate of the deceased. For that purpose, it is reasonable that the plaintiff be given such accounts. E F

CONCLUSION

**[75]** Based on the foregoing considerations, I therefore order accordingly. G

*Order accordingly.*

Reported by Ashok Kumar

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